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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-974

PEABODY COAL COMPANY,

Petitioner,

v.

LOCAL UNIONS NOS. 1734, 1508 AND 1548, UNITED MINE WORKERS OF AMERICA, AND DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Locals 1734, 1508 and 1548 of the United Mine Workers of America (UMWA) hereby answer in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 543 F.2d 10 and appears as Appendix A in the petition, while the opinion of the District Court for the Western District of Kentucky, which was not reported, appears as the peti-

tion's Appendix B. The District Court's opinion was issued on remand from a previous decision of the Court of Appeals which was reported at 484 F.2d 78 and is set out in the Court of Appeals appendix (CA) at 514-22. The District Court's original opinions, likewise unreported, are set out at CA 486-91 and 511-13.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it followed ordinary principles of agency law and held that a union can only be held vicariously liable in civil contempt for the actions of its officers and agents within the scope of their authority.

2. Whether the Court of Appeals erred in holding that where an employer-drafted Boys Markets temporary restraining order only prohibits a union from engaging in and ordering its members to engage in a work stoppage, and does not order the union to take affirmative action designed to bring the stoppage to an end, the union cannot be held liable in civil contempt for failure to use its undefined "best efforts" to end the stoppage, even assuming *arguendo* that it failed to do so.

STATEMENT OF THE CASE

On different days in early June of 1972, work stoppages erupted at three mines operated in western Kentucky by petitioner Peabody Coal Company (Peabody), over disputes subject to resolution through the grievance procedure in the collective bargaining agreement then in force there. The respondents herein (unions) are the local collective bargaining representatives of the employees at the three mines. Peabody later contended that the unions had initiated or ratified the stoppages, and advanced allegations like those at pages 6 to 8 of the petition (Pet.), but those allegations were disputed, and after a hearing the District Court merely

found that "miners" had stopped work and not that the unions had done so. (Pet. A7)

On June 6, 1972, acting on a complaint filed by Peabody, the District Court (Bratcher, J.) signed a temporary restraining order Peabody had presented to it which prohibited the unions, UMWA District 23, and the unions' "members officers, agents, servants, and employees" from "engaging in strikes, work stoppages, or concerted refusals to work" over the grievances in question, from "refusing to submit" the grievances "to the grievance procedure" for resolution, and from "inducing, instructing, persuading or encouraging" employees to stop work at the three mines. (CA 29-30) But despite the efforts of officers of the unions, UMWA District 23, and the UMWA International as well, who all personally urged the miners to return to work, they refused and stayed out. (Pet. A4, A9) Peabody then filed various contempt motions, but rather than asking the District Court to take action against the striking miners, Peabody instead asked only that the unions and District 23 be held in contempt. (CA 34-39, 151-54) Peabody never asked the District Court to take action against the striking miners.

On June 22, 1972, without a hearing, the District Court found the unions and District 23 in civil contempt, fining each of the unions $6,500, and District 23 $13,000. (CA 486-91, 511-13) The contempt judgments were set aside by the Court of Appeals for the Sixth Circuit on September 13, 1973 (484 F.2d 78), reentered after further consideration on remand (by Gordon, J.) on May 16, 1975 (Pet. A7-A14), and affirmed as to District 23 but vacated as to the locals on October 19, 1976, in the Court of Appeals decision Peabody challenges in part[1] here (Pet. A1-A6).

In its decision on remand, the District Court held that the unions were in contempt simply because they "ordered the

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[1] We presume Peabody is not seeking review of the affirmance of its judgment against District 23.

miners to return to work and they did not do so." (Pet. A3, A11) As the Court of Appeals noted, "[t]he district judge made no finding that the Unions or their officers induced, persuaded or encouraged the work stoppages in violation of the prohibitions of the temporary restraining order." (Pet. A4) The District Court asserted that a union complying with its statutory responsibility "to act as the bargaining agent, must be held responsible for the mass action of its members" because "[m]en just do not act collectively without leadership,"[2] and found that the unions and District "were functioning in the matter in issue long before the strikes began and continuing right on through the period of contempt."[3] (Pet. A12)

The Court of Appeals (per Peck, J.) reversed the contempt findings with respect to the unions, holding that "a union may only be held responsible for the authorized or ratified actions of its officers and agents." It added that the temporary restraining order had not ordered "any affirmative action on the part of the [unions] aimed at getting the membership back to work," and "from this" declined "to infer a requirement that the Unions use their 'best efforts' to end the work stoppages," or take any other sort of affirmative action. (Pet. A3-A4) The contempt finding with respect to District 23 was affirmed on alternative grounds not

[2] For this proposition the District Court relied upon *Bethlehem Mines Corp.* v. *UMWA,* 340 F.Supp. 829 (W.D. Pa. 1972), which had been vacated on appeal two years earlier, CA 3 No. 72-1466 (unreported) (June 19, 1973), and *Teamsters* v. *Humko Co.,* 287 F.2d 231, 241 (CA 6, 1961), where the Court of Appeals unsurprisingly concluded that there was "nothing 'wildcat' about a 400-mile [picketing] trip taken by a group of adults, with a union official in charge." Equally unsurprisingly, Peabody does not try to rely upon either of the decisions cited by the District Court in the petition.

[3] The unions had apparently been "functioning" because they had processed their members' grievances, and because they appeared in District Court after being summoned. (Pet. A12)

relied upon by the District Court in its decision. (Pet. A5-A6).

Peabody filed its petition for certiorari in this Court on January 13, 1977, without filing a petition for rehearing in the Court of Appeals, although Peabody now purports to believe (Pet. A13-A15) that the Court of Appeals' decision was contrary to one of its earlier decisions. District 23 has not sought further review.

ARGUMENT

I. THE COURT OF APPEALS DECISION IS CLEARLY CORRECT

1. The Court of Appeals obviously did not err in holding that a union can only be held vicariously responsible for actions of its officers and agents within the scope of their authority, for their "authorized actions," and in declining Peabody's invitation to create no-fault union liability for the unauthorized and unratified actions of union members. Unions are no more liable for the actions of the employees they are elected to represent than corporations are for the actions of the stockholders they represent, or members of Congress are for the actions of the constituents they are elected to represent. This Court has itself stressed that a union's responsibility for the actions of its members is to be measured "by normal rules of agency law" *UMWA* v. *Gibbs,* 383 U.S. 715, 736 (1966). As Professor Cox put it in his seminal article on the Taft-Hartley Act, "just as a corporation is not liable for the acts of a stockholder, so recognition of a labor organization as a juristic personality prevents imposing liability on it for the acts of its members." A. Cox, *Some Aspects of the Labor-Management Relations Act, 1947,* 61 Harv. L. Rev. 274, 310 (1948).

In line with *Gibbs,* the National Labor Relations Board has always held:

> "The very fact of mass quitting alone supplies persuasive evidence . . . that [a] cessation of work was the

> outcome of . . . concerted action aimed at a common objective. . . . That is not to say, however, that where the employees are organized, an inference is also justified that the strike or concerted action was authorized by their labor organization. *Union responsibility must be established by an independent showing.*

IBEW Local 760 (Roane Anderson Co.), 82 NLRB 696, 704 (1949) (emphasis added). *Accord, Southeast Idaho Building Trades Council (Westinghouse Electric Co.),* 164 NLRB 773, 779 (1967); *UMWA District 6 (Consolidation Coal Co.),* 217 NLRB No. 88, at 25 (1974). The Courts of Appeals agree:

> "The fact that [a] strike took place is not sufficient to raise the presumption that the union, as an entity separate from its members, is responsible. *No federal appellate court case has held unions to* [*such a*] *high standard of vicarious liability.*"

United States Steel Corp. v. *UMWA,* 519 F.2d 1249, 1253 (CA 5, 1975), *reh. denied,* 526 F.2d 377 (1976). *Accord, e.g., Penn Packing Co.* v. *Amalgamated Meat Cutters Local 195,* 497 F.2d 888, 890-91 (CA 3, 1974); *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 876-79 (CA 4), *cert. denied,* 350 U.S. 847 (1955); *United States* v. *UMWA,* 177 F.2d 29, 36 (CA DC), *cert. denied,* 338 U.S. 871 (1949).

This should particularly be so in civil contempt actions, where union responsibility, like all other elements of the alleged offense, must be proven by "clear and convincing" evidence. See *California Artificial Stone Paving Co.* v. *Molitor,* 113 U.S. 609, 618 (1885); *Hart Schaffner & Marx* v. *Alexander's,* 341 F.2d 101, 102 (CA 2, 1965); *Schauffler* v. *Longshoremen's Local 1291,* 292 F.2d 182, 188-89 (CA 3, 1961); *Telling* v. *Bellows-Claude Neon Co.,* 77 F.2d 584, 585 (CA 6), *cert. denied,* 296 U.S. 594 (1935); *Kansas City Power & Light Co.* v. *NLRB,* 137 F.2d 77, 79 (CA 8, 1943).

"[A] bare preponderance of the evidence will not suffice." 3 C. Wright & A. Miller, *Federal Practice & Procedure* 591 (1973).

2. Nor did the Court of Appeals err in refusing to "imply" an affirmative "best efforts" obligation into the merely prohibitory language of the temporary restraining order, and thus to convert it, after the fact, from a non-appealable "prohibitory" order to a "mandatory" order that would have been appealable.[4]

"Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive *explicit* notice of precisely what conduct is outlawed." *Schmidt* v. *Lessard,* 414 U.S. 473, 476 (1974) (emphasis added). The Court of Appeals had to either construe the temporary restraining order as containing only a prohibitory command in accordance with its explicit language, thus making any lack of affirmative action fully lawful in terms of contempt, or pronounce it too vague to be enforceable in contempt because of a complete lack of fair notice that a mandatory command was intended. Neither Due Process nor federal equity doctrine tolerate contempts based on decrees too vague to be understood, much less contempts based upon mandatory commands that never found their way from the minds of plaintiffs to operative judicial orders. See *International Longshoremen's Ass'n.* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 76 (1967); *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926); *New York Telephone Co.* v. *CWA,* 445 F.2d 39, 48-49 (CA 2, 1971); *NLRB* v. *Heck's Inc.,* 388 F.2d 668 (CA 4, 1967).

Respondents would only add that implication of a "best efforts" obligation would have been particularly inappropriate here, where the bargaining history of the collective bargaining agreement the District Court's order was enforc-

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[4] *Belknap* v. *Leary,* 427 F.2d 406 (CA 2, 1970).

ing indicated that no "best efforts" obligation was to be implied into its provisions, so that an explicit "best efforts" requirement obviously could not properly have been included in the order. At one time (1950-52), the national coal agreement did contain a clause requiring the UMWA to use its "best efforts . . . to prevent stoppages of work by strike." But the UMWA was able to get that clause deleted, in return for bargaining table concessions to the coal operators on other questions, and did so as it had "proved unsatisfactory" to UMWA entities "because it laid them open to criticism for measures which they took, or did not take, in disciplining locals or members who engaged in unauthorized stoppages." *UMWA* v. *NLRB,* 257 F.2d 211, 216-17 (CA DC, 1958); see *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 350 & n. 5 (CA 6, 1958), *aff'd equally divided,* 361 U.S. 469 (1960). Similarly, indemnity clauses in former agreements, which made the union liable for unauthorized work stoppages, were eliminated in 1947 because of "the danger of suits for breach of contract" under the new Taft-Hartley Act. *Id.* The agreement in effect in June 1972 even went so far as to note the deletion of these provisions (CA 66), and to "expressly repeal" all provisions in district and local agreements creating "no strike, indemnity, or guarantee" obligations (CA 95). In short, Peabody is trying to have its cake and eat it too.

II. THERE IS NO CONFLICT OF DECISION

1. Peabody alleges that the Court of Appeals declined to follow "ordinary standards of agency law" in determining whether the unions had been in contempt, and that it instead, in conflict with decisions of this Court and other Courts of Appeals, applied the stricter union liability test set out in § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (Pet. A18-A22). That allegation, however, is clearly incorrect as a factual matter. The decision says nothing about "clear proof" or limiting union responsibility to actions that

were "specifically authorized" or "specifically ratified" as under § 6; in reality, the Court of Appeals held that a union is responsible for *all* "authorized or ratified actions of its members" as under normal agency principles, and not merely those specifically authorized or ratified. (Pet. A3-A4) Section 6 was not even mentioned in the decision, let alone relied upon, and the unions never argued that § 6 applied, although they of course pointed out that as already noted in part I.1. *supra,* "clear and convincing evidence" is required in all civil contempt actions.

2. Nor have the Third, Fifth and Eighth Circuits, and the Sixth Circuit itself, gone beyond normal principles of agency law to hold that the unauthorized and unratified "mass action" of union members is, "in and of itself," sufficient to place a union in civil contempt. (Pet. 13-18) In fact, none of the Third, Fifth and Eighth Circuit decisions relied upon deal with civil contempt at all; they all deal with injunction and damage verdicts which need only be predicated upon a preponderance of evidence, not "clear and convincing evidence." Furthermore, as the Fifth Circuit has pointed out, in actuality "*no* federal appellate court case" has ever held that "the fact that [a] strike took place is . . . sufficient in itself to raise the presumption that [a] union, as an entity separate from its members, is responsible." *United States Steel Corp.* v. *UMWA,* 519 F.2d 1249, 1256 (CA 5, 1975), *reh. denied,* 526 F.2d 377, 378 (1976). With specific reference to the earlier Fifth Circuit decision Peabody relies upon, namely *Vulcan Materials Co.* v. *United Steelworkers,* 430 F.2d 446 (CA 5, 1970), *cert. denied,* 401 U.S. 963 (1971), the *U.S. Steel* Court observed that when *Vulcan* is "[r]ead in context it is clear that the [Vulcan] Court was *not* laying down a per se rule that a union is liable every time its members go on strike," and that the unions in *Vulcan* had "induced and encouraged the Vulcan employees to refuse to work." 519 F.2d at 1253 (emphasis added).

Similarly, in Peabody's most recent Third Circuit decision, *United States Steel Corp.* v. *UMWA,* 534 F.2d 1063, 1074 (CA 3, 1976) (emphasis added), that Court observed that "mass action" does not create "strict union liability" in any event, and was careful to say that since the only question before it was the propriety of a preliminary injunction, which it vacated, it had "no occasion . . . to consider the extent, *if any,* to which [union] members' actions may make [unions] liable in damages" or, obviously, in contempt. And in a recent damage case, the Third Circuit stated that "liability [will] not be imposed on a union for an unauthorized strike in the absence of specific [contractual] language so requiring." *Penn Packing Co.* v. *Amalgamated Meat Cutters Local 195,* 497 F.2d 888, 891 (CA 3, 1974).

As for Peabody's other citations, in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 873, 876-77 (CA 4), *cert. denied,* 350 U.S. 847 (1955), the Court observed that a local union would obviously have been liable in damages for a strike it had voted to ratify, if it had been sued. In *Wagner Electric Corp.* v. *Local 1104, IUE,* 491 F.2d 954, 956 (CA 8, 1974), a union was held liable for a strike in damages because of "the involvement of union officers and stewards in initiating the strike," and not merely because union members had struck. And in *North American Coal Corp.* v. *UMWA Local 2262,* 497 F.2d 459, 467 (CA 6, 1974), the Court only remanded a criminal contempt action for a hearing on whether a union had ratified an unauthorized work stoppage in a union meeting.[5]

The respondents would add that Peabody's "mass action" proposition—that unions should be held responsible for the unauthorized and unratified actions of their members in any dispute where they have "functioned"—is clearly contrary to federal labor policy as set out by this Court in *UMWA* v. *Gibbs,* 383 U.S. 715, 739 (1966). There this

[5] This Court does not grant certiorari to resolve intra-circuit conflicts anyway.

Court declared that unions should be encouraged to "exercise a restraining influence" in "explosive" situations, and therefore should not be made to risk liability for entering them. A union should be encouraged "to take up the dispute" so that it might be resolved more quickly and industrial relations may be more quickly normalized. In short, federal labor policy requires that a union be allowed to "function" in disputes between its members and their employers without incurring no-fault contempt or damage liability for doing so.

3. Finally, Peabody errs in implying that the Third, Fifth and Eighth Circuits have held that purely prohibitory anti-strike injunctions impliedly require unions to use their "best efforts" to end enjoined unauthorized strikes. (Pet. 22-24) As before, all of the decisions Peabody relies upon are damage and injunction decisions; none of them involve contempt, where liability is to be determined from the four corners of the decree allegedly violated, and must be predicated on "clear and convincing evidence." In fact, in the most recent Third Circuit decision cited, *United States Steel Corp.* v. *UMWA,* 534 F.2d 1063, 1078 (CA 3, 1976), that Court stated that even where an anti-strike injunction imposes a "best efforts" obligation, the decree is invalid for vagueness unless it also tells the union "the specific steps it must take." Thus in the Third Circuit, *a fortiori,* if a decree does not order that "best efforts" be made at all, it cannot be held to require them.

Furthermore, none of the cited Circuits have imposed even "best efforts" damage liability on facts like those here. In the other cited Third Circuit decision, *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951, 960 (CA 3, 1975), that Court implied a "best efforts" obligation in a damage suit where the unions had bound themselves by an express no strike covenant, but indicated that it would not pyramid implications by finding such an implication in cases where, as here, a no strike obligation is itself implied from the ex-

istence of a grievance procedure. The Fifth Circuit has agreed. *United States Steel Corp.* v. *UMWA,* 519 F.2d 1249, 1252-53 (CA 5, 1975), *reh. denied,* 526 F.2d 377 (1976). And see Part II.2. *supra* with respect to the Fifth Circuit's earlier decision in *Vulcan, supra,* and the Eighth Circuit's decision in *Wagner Electric, supra.* (See also Part I.2. *supra* with respect to the express repudiation of any "best efforts" obligation in the collective bargaining agreement here.)

For the foregoing reasons, the respondents submit that the petition for a writ of certiorari should be denied.

CONCLUSION

Respectfully submitted,

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